

STATE OF MICHIGAN
IN THE SUPREME COURT

SUE H. APSEY AND ROBERT APSEY, JR.

Supreme Court No. 129134

Plaintiffs-Appellees/Cross-Appellants,

Court of Appeals No. 251110

v

Shiawassee Circuit Court

No. 01-007289-NH

MEMORIAL HOSPITAL, et al.,

Defendants-Appellants/Cross-Appellees,

129134 *FILED*

**AMICUS CURIAE BRIEF OF
STATE OF MICHIGAN, DEPARTMENT OF COMMUNITY HEALTH
IN OPPOSITION TO DEFENDANTS' APPLICATION FOR LEAVE TO APPEAL**

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QUESTION PRESENTED FOR REVIEW

This Court generally will only grant an application for leave to appeal where the party seeking leave demonstrates facts and allegations that satisfy at least one of the specific grounds for granting leave set forth in MCR 7.302(B). An appellate court may accord a decision prospective application when the interests of justice or equity substantiate such treatment. In this case, retroactive application of the Court of Appeals' decision would be unjust and inequitable with respect to the numerous pending medical malpractice claims affected by the Court's decision on the merits. Under the specific circumstances of this case, did the Court of Appeals correctly accord its decision prospective effect only?

COUNTER-STATEMENT OF JUDGMENT APPEALED FROM, GROUNDS, AND RELIEF SOUGHT

Defendants-Appellants seek leave to appeal from the Court of Appeals' decision in *Apsey v Memorial Hospital (On Reconsideration)*,¹ in which the Court affirmed its earlier decision on the merits regarding the applicability of MCL 600.2102 to out-of-state affidavits of merit filed in support of medical malpractice claims under MCL 600.2912d, but gave its opinion prospective application only. Defendants ask this Court to grant leave to appeal and reverse only the Court of Appeals' equitable decision to accord its opinion prospective application. Defendants do not cite any of the grounds for granting applications for leave to appeal under MCR 7.302(B). Defendants argue that this Court should grant leave to appeal to "address the problem of pure prospectivity in light of Const 1963, art 6, § 1, and in the face of a blatant attempt to limit the effect of a decision compelled by the unambiguous language of our statutes but which the Court of Appeals found undesirable." (Defendants' Application, p 6.) Defendants argue that the Court of Appeals was "swayed by the concentrated efforts of interest groups" to improperly accord its decision prospective application. *Id.*, p 8. Contrary to these assertions, even a cursory review of the Court of Appeals' decision in this matter reveals that the Court conducted a thorough analysis of the substantive issue presented to it, and a careful and thoughtful review of the meritorious arguments presented to it that favored prospective application of its decision. The Court's decision was consistent with prior decisions by this Court, and was supported by the specific factual and legal circumstances of this case. Thus, there is no reason for this Court to disturb the decision by the Court of Appeals, and Defendants' application for leave to appeal should be denied.

¹ *Apsey v Memorial Hospital (On Reconsideration)*, 266 Mich App 666; 702 NW2d 870 (2005).

COUNTER-STATEMENT OF PROCEEDINGS AND FACTS

On April 19, 2005, the Court of Appeals issued an opinion in this case, concluding that an out-of-state affidavit of merit filed by a plaintiff in support of a medical malpractice action under MCL 600.2912d must receive additional certification under MCL 600.2102 in order to be considered a valid and effective affidavit for purposes of commencing a medical malpractice action.

The decision by the Court of Appeals raised concerns within the Department of Community Health (DCH). DCH administers the joint federal and State program known as Medicaid pursuant to the federal Social Security Act and the Michigan Social Welfare Act.² The Medicaid program provides health-care benefits to the poor and should not be confused with the Medicare program that provides health-care benefits to the aged. Medicaid reimburses participating medical providers for medically necessary services for those persons who meet the asset and income eligibility limits of the program.

When persons are unable to pay for their medical needs they can apply for Medicaid, and if found eligible, the State will pay for the medical services with State and federal matching funds. There is approximately a 45/55 split between the State general funds and federal matching funds.

When DCH expends Medicaid funds on behalf of an individual, it must ascertain whether a third party is liable, and if so, seek recovery from those third parties responsible for the injuries and medical condition of the Medicaid recipient.³ Examples of potential third-party liability are insurance companies (no fault cases), landlords (slip and falls), tortfeasors and medical providers (malpractice cases).

² 42 USC 1396 *et seq*; MCL 400.105 *et seq*.

³ 42 USC 1396a(a)(25) and MCL 400.106.

DCH is then subrogated to any right of recovery that the recipient may have for the cost of hospitalization, physician, outpatient, ambulance, pharmaceutical and other medical services that DCH provided or will provide through the Medicaid program.⁴ The Department is authorized to bring its own action for recovery or may intervene in cases that have already been filed in court. The Attorney General represents DCH in these proceedings.

The attached affidavit of DCH employee Jane Alexander shows that DCH presently has approximately 118 pending medical malpractice cases, many of which are supported in whole or in part by affidavits executed outside the State.⁵ The Medicaid funds at stake in these cases total approximately \$7,098,374. DCH was also concerned that the rationale applied by the Court of Appeals could be extended to other circumstances, like product liability claims where some of the medical evidence is based on non-Michigan treating providers or experts. The Medicaid funds at stake in these cases could total another \$500,000.⁶ Denying DCH the opportunity to collect these monies will have a significant negative impact on DCH's budget.⁷

Plaintiffs filed a motion for reconsideration on May 10, 2005, arguing that the Court of Appeals had palpably erred in its interpretation and application of MCL 600.2102. DCH requested that the Attorney General file an amicus brief on behalf of DCH to address the potentially significant impact the Court of Appeals' decision will have on DCH's ability to recoup Medicaid payments through subrogation claims. Along with DCH's brief, the Court of Appeals received amicus briefs from; the Michigan Trial Lawyers Association, the United Auto

⁴ MCL 400.106.

⁵ Affidavit attached as Appendix A, ¶ 5. This affidavit was submitted to the Court of Appeals in support of DCH's amicus curiae brief filed with that Court. Should this Court grant Defendants' application for leave to appeal, DCH anticipates filing an updated affidavit to reflect more recent data.

⁶ *Id.*

⁷ *Id.* at ¶ 7.

Workers, State Bar of Michigan Negligence Section and State Bar of Michigan Elder Law Section, Citizens for Better Care, State Bar of Michigan, the Michigan Defense Trial Counsel, and the Michigan State Medical Society.

On June 2, 2005, the Court of Appeals granted the motion for reconsideration, and vacated its April 19, 2005, opinion. On June 9, 2005, a majority⁸ for the Court released a revised opinion in which it reached the same legal conclusion with respect to MCL 600.2102, but accorded its decision prospective application only in the interests of justice and equity.⁹

Defendants filed their application for leave to appeal on or about July 21, 2005. DCH files the instant amicus curiae brief in opposition to Defendants' application for leave to appeal.

⁸ Judge Cavanagh dissented, stating that he now believed the majority's interpretation of MCL 600.2102 was incorrect.

⁹ DCH's amicus brief in support of reconsideration requested that the Court consider according its decision prospective application only at least with respect to pending malpractice claims. Although not a common practice, the Court of Appeals has accorded decisions prospective application. See, e.g., *LCI v Dep't of Commerce*, 227 Mich App 196; 574 NW2d 710 (1997).

ARGUMENT

This Court generally will only grant an application for leave to appeal where the party seeking leave demonstrates facts and allegations that satisfy at least one of the specific grounds for granting leave set forth in MCR 7.302(B). An appellate court may accord a decision prospective application when the interests of justice or equity substantiate such treatment. In this case, retroactive application of the Court of Appeals' decision would be unjust and inequitable with respect to the numerous pending medical malpractice claims affected by the Court's decision on the merits. Under the specific circumstances of this case, the Court of Appeals correctly accorded its decision prospective effect only.

A. Standard of Review.

This Court reviews de novo a question of whether a judicial decision should have retroactive application, which is a question of law.¹⁰

B. The Court of Appeals, on reconsideration, properly accorded its decision prospective application.

The Court of Appeals decision will affect hundreds of pending medical malpractice cases. Indeed, as noted above DCH has at least 118 pending cases, and the potential financial impact in losing the opportunity to recover Medicaid funds in these cases is significant, particularly in the present economic climate. To the extent the Court of Appeals decision set precedent with respect to the notarization of out-of-state affidavits of merit, the Court properly gave its decision prospective effect only.

On reconsideration, the Court of Appeals concluded that "[b]ecause of the injustice and inequity that could result from [its] determination" it would accord its decision prospective effect.¹¹ The Court observed that "[c]omplete prospective application has been deemed appropriate for a decision that 'decides an "issue of first impression whose resolution was not

¹⁰ *People v Sexton*, 458 Mich 43, 52; 580 NW2d 404 (1998).

¹¹ *Apsey*, 266 Mich App at 678.

clearly foreshadowed."¹² The Court of Appeals concluded that its determination regarding § 2102's applicability to affidavits of merit filed in medical malpractice cases was essentially an "issue of first impression whose resolution because of the URAA, was not clearly foreshadowed"¹³:

Our decision is based on a law, MCL 600.2102, requiring a special certification for out-of-state notarial acts, which law has been overlooked by practitioners in medical malpractice cases or, more likely, practitioners have been under the impression that the URAA, enacted subsequently to MCL 600.2102, was the applicable statute and that special certification was not required. Plaintiffs' counsel raised a concern at oral argument with regard to the significant effect this holding could have on medical malpractice cases in Michigan because a majority of affidavits of merit for medical malpractice cases come from out of state and practitioners have relied on the URAA validation requirements for the out-of-state notarial acts. Amici curiae have also raised concerns regarding practitioners' beliefs that the less restrictive URAA requirements for verification of notarial acts was sufficient verification and regarding the significant effect this decision would have on medical malpractice claims, which are in large part supported by affidavits of merit from out-of-state doctors. Apparently, there has been confusion in the legal community about whether the more relaxed standards of the URAA applied. In light of the apparent reliance on the URAA by the legal community, we believe that justice requires a prospective application. Retroactive application would result in the dismissal of a large number of otherwise meritorious medical malpractice claims. Our Supreme Court has recognized that "resolution of the retrospective-prospective issue ultimately turns on considerations of fairness and public policy." Fairness and public policy both support a prospective application because serious injustices could result from a retroactive application and prospective application of the ramifications for the failure to provide the MCL 600.2102(d) certification accomplishes a "maximum of justice" under the presented circumstances.

With respect to *pending* medical malpractice cases, the Court of Appeals held that "where plaintiffs are not in compliance with MCL 600.2102(4), on the basis of justice and equity, *plaintiffs can come into compliance by filing the proper certification.*"¹⁴ The Court further

¹² *Apsey*, 266 Mich App at 679, quoting *Lindsey v Harper Hospital*, 455 Mich 56, 68; 564 NW2d 861 (1997), quoting *People v Phillips*, 416 Mich 63, 68; 330 NW2d 366 (1982), quoting *Chevron Oil Co v Huson*, 404 US 97, 106; 92 S Ct 349; 30 L Ed 2d 296 (1971).

¹³ *Apsey*, 266 Mich App at 679-680.

¹⁴ *Apsey*, 266 Mich App at 682.

acknowledged that "justice and equity also dictates a strict application from the date of this opinion. From the date of the issuance of this opinion, any affidavit of merit acknowledged by an out of state notary filed without proper certification will not toll the statute of limitations" ¹⁵ Thus, the Court of Appeals decision will apply to pending cases unless affected plaintiffs file the additional certification required under § 2102.

It is evident from the opinion that the majority strove to achieve both a sound, legal determination as well as an equitable result under the circumstances. The majority was obviously concerned that the unambiguous terms of § 2102 were not being followed, and thus clearly articulated and instructed the parties and the legal community with respect to the law. But the Court also recognized that, absent its opinion, there was a credible basis for the plaintiff's, indeed the legal community's, apparent failure to follow § 2102 in filing affidavits of merit. The Court further recognized that its decision would have ramifications well beyond the instant case, and could unjustly upset the settled expectations of hundreds of plaintiffs and defendants in pending medical malpractice lawsuits. Accordingly, the majority exercised its equitable powers and fashioned a result that was sound with respect to the merits, and equitable.

Defendants simply disagree with the Court's equitable resolution of this case, and argue that the majority failed to follow this Court's precedent in according its decision prospective application. However, the majority's decision here is consistent with this Court's precedent, and there is no compelling basis for this Court to reverse the equitable resolution of the instant matter.

¹⁵ *Apsey*, 266 Mich App at 682-683.

In *Lindsey v Harper Hospital*, this Court observed that the "general rule is that judicial decisions are to be given full retroactive effect,"¹⁶ but that "where injustice might result from full retroactivity, this Court has adopted a more flexible approach, giving holdings limited retroactive or prospective effect. This flexibility is intended to accomplish the 'maximum of justice' under varied circumstances."¹⁷ The *Lindsey* Court thus observed that "[p]rospective application of a holding is appropriate when the holding overrules settled precedent *or decides an "issue of first impression whose resolution was not clearly foreshadowed."*"¹⁸

In *Lindsey*, the Supreme Court interpreted for the first time the interplay of a statute of limitations and a savings provision in the context of a medical malpractice action, and ultimately determined that the plaintiff's claim was untimely filed. Addressing the plaintiff's claim that any decision should be applied prospectively, this Court determined that "the balance of justice [did not] demand[] prospective application in [that] case."¹⁹ The Court reasoned that its decision was consistent with the purpose of statutes of limitation, which is to protect defendants against stale claims, and the general rule of interpreting exceptions to those statutes narrowly. The Court also observed that the plaintiff in that case had taken actions within the relevant time period, and that it was not unfair to accord her the responsibility of filing a timely action as well.²⁰

Here, the Court of Appeals concluded that the issue presented to it was a case of first impression the resolution of which was not clearly foreshadowed because of the URAA and, contrary to *Lindsey*, that the balance of justice did demand prospective application of its decision

¹⁶ *Lindsey v Harper Hospital*, 455 Mich 56, 68; 564 NW2d 861 (1997), citing *Hyde v Univ of Michigan Bd of Regents*, 426 Mich 223, 240; 393 NW2d 847 (1986).

¹⁷ *Lindsey*, 455 Mich at 68, quoting *Tebo v Havlik*, 418 Mich 350, 360; 343 NW2d 181 (1984).

¹⁸ *Lindsey*, 455 Mich at 68, quoting *People v Phillips*, 416 Mich 63, 68; 330 NW2d 366 (1982), citing *Chevron Oil Co v Huson*, 404 US 97, 106; 92 S Ct 349; 30 L Ed 2d 296 (1971).

¹⁹ *Lindsey*, 455 Mich at 69.

²⁰ *Lindsey*, 455 Mich at 69.

under the specific factual and legal circumstances of this case. As set forth in the opinion, this conclusion was adequately supported by the facts and arguments presented to the Court of Appeals by Plaintiff and many of the amici curiae. Indeed, the *Apsey* Court's decision is consistent with this Court's decision in *Gladych v New Family Homes, Inc.*, in which this Court accorded limited retroactive and prospective application of its decision, observing that "[a]lthough this opinion gives effect to the intent of the Legislature that may be reasonably inferred from the unambiguous text of [the statute], practically speaking our holding is akin to the announcement of a new rule of law" ²¹ The same can be said of the Court's decision in this case. Here, none of the statutes involved are ambiguous, but the relationship of the statutes to each other, and which statute trumped the other, was unclear. No other State appellate court had addressed the interplay of § 2102, the URAA, and § 2912d. The Court of Appeals resolved this question of first impression after analyzing meritorious legal arguments filed by each party.

The Court of Appeals balanced the equities of the competing interests at stake as presented to it in the record, and concluded that the "maximum of justice" would be served by according its decision prospective application. Upon this record, there is no reason for this Court to disturb the legally sound and carefully reasoned opinion of the Court of Appeals in this case, where that decision is consistent with this Court's precedent, and in fact, is just. ²²

²¹ *Gladych v New Family Homes, Inc.*, 468 Mich 594, 606-607; 664 NW2d 705 (2003).

²² DCH recognizes that this Court has strictly construed the type of cases that will fall within the first exception to retroactivity, i.e. those decisions overruling prior precedent. See *Wayne Co v Hathcock*, 471 Mich 445, 485 n98; 684 NW2d 765 (2004); *Devillers v Auto Club Insurance Ass'n*, 473 Mich 562, 586; 702 NW2d 539 (2005); *People v Houlihan*, 474 Mich 958; 706 NW2d 731 (2005). However, these decisions do not address the scope of what cases fall within the exception for decisions of first impression, applicable here, and therefore are not on point with respect to the issues presented herein.

CONCLUSION AND RELIEF REQUESTED

The State of Michigan, Department of Community Health, respectfully requests that this Honorable Court deny Defendants' application for leave to appeal as it fails to satisfy any of the grounds for granting an appeal under MCR 7.302(B).

Respectfully submitted,

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